

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Administrative Penalty  
Order Issued to Paint with Prep, Inc.

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on August 5, 2009, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. Additional records were submitted and received into the hearing record after the conclusion of the hearing,<sup>1</sup> and the parties submitted post-hearing briefs. The OAH hearing record closed on September 14, 2009, with the receipt of notification from the Minnesota Pollution Control Agency that it would not be filing a reply brief.

Ann E. Cohen, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared on behalf of the Minnesota Pollution Control Agency. Britt Ackerman, Attorney at Law, Hvistendahl, Moersch & Dorsey, P.A., 311 South Water Street, P.O. Box 651, Northfield, MN 55057-0651, appeared on behalf of Paint with Prep, Inc.

**STATEMENT OF ISSUES**

1. Did Paint with Prep, Inc., violate applicable laws and rules by disposing of prohibited materials by burning, disposing of used sandblast media on its property without a permit, failing to evaluate paint-related wastes to determine if they were hazardous, disposing of solvents by evaporation, mismanaging used oil, failing to apply for a hazardous waste generator identification number and license, or failing to calculate potential to emit and apply for an air quality permit and submit emissions inventory information?

2. If so, were certain of the violations serious, requiring imposition of a non-forgivable penalty, and was the assessed penalty reasonable and appropriate?

The Administrative Law Judge concludes that Paint with Prep violated applicable statutes and rules with the exception of disposing of solvents by evaporation and that

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<sup>1</sup> Those documents, consisting of Case Development Forms, Administrative Penalty Orders, and Administrative Penalty Order Penalty Calculation Worksheets relating to Thielen Construction Co, Inc., Eagle Transport Services, Inc., Dyrdaahl Lumber, and Hammell Equipment, Inc., have been received into the hearing record as Exhibits 5-8.

certain of the violations were properly determined to be non-forgivable, but that the assessed penalty is unreasonable and inappropriate in light of the statutory factors.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

## **FINDINGS OF FACT**

### **Background**

1. Paint With Prep, Inc. (PWP), is a sandblasting, water-jetting, and painting business that has been owned and operated by Jim Hernke since 1994. PWP does not perform metal plating.<sup>2</sup>

2. Until approximately 2002, PWP conducted some of its operations in a rented shop. Around 2002, Mr. Hernke built a shop on the rural 7½-acre property in Cannon Falls where he and his wife reside. PWP uses the shop for some painting, particularly during the off-season. Some other out-buildings located on the Cannon Falls property are used to store paint products. However, the bulk of PWP's work (approximately ninety percent) is performed off-site at various locations. Mr. Hernke occasionally hires one or two part-time workers when he is working off-site.<sup>3</sup>

3. As part of its business, PWP at times prepares items for painting by sandblasting them. When sandblasting to remove paint or prepare metal for painting, PWP uses a coal slag product called "Black Diamond" as grit or "sandblast media."<sup>4</sup>

4. When painting, PWP typically applies either latex paint or a "two-component" paint. Once a catalyst is added to a two-component paint, it must be used within the next 8-12 hours. After that time, the paint becomes "cured" or hardened, even in a closed container. The paint manufacturer's representative instructed Mr. Hernke that, as an alternative, he could lay out paint for curing on a tarp. The representative informed Mr. Hernke that cured paint could be disposed of as a solid waste.<sup>5</sup>

5. Mr. Hernke often uses a pressurized paint gun system when painting. To clean the paint out of the paint gun, he cycles solvent through the hose and pump several times, and collects the discharge in a container. He closes the lid on the container immediately and allows the solvent to rise to the top. He later pours the solvent off the top and re-uses it. He does not leave the lid off of the container or otherwise cause the solvent to evaporate.<sup>6</sup>

6. Paint may contain lead or other hazardous substances such as cadmium and chromium.<sup>7</sup> Evaluation is required to determine whether or not paint-related waste

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<sup>2</sup> Testimony of Jim Hernke.

<sup>3</sup> Testimony of Cory Boeck, Hernke; Exhibits O, R.

<sup>4</sup> Testimony of Hernke, Boeck.

<sup>5</sup> Testimony of Hernke.

<sup>6</sup> Testimony of Hernke, Gikas.

<sup>7</sup> Testimony of Gegen, Gikas.

is hazardous and decide the proper way to dispose of the waste.<sup>8</sup> Solvents with a flash point of less than 140 degrees, such as the thinner used by PWP, are considered hazardous in terms of ignitability.<sup>9</sup>

7. PWP is not certified for lead and does not use lead paint. PWP also does not sandblast items to which lead paint has been applied. PWP asks customers if an item has previously been painted with lead paint. If they do not know, PWP asks the length of time the paint has been on the item and also tests the item for lead.<sup>10</sup>

### **MPCA Inspection**

8. In November 2008, a complaint was received by the Minnesota Pollution Control Agency (MPCA) through Goodhue County regarding noise, odors, run-off, and possible mismanagement of solid waste and hazardous waste by PWP. Goodhue County obtained a warrant to inspect the property.<sup>11</sup>

9. On November 19, 2008, Cory Boeck, Pollution Control Specialist with the Minnesota Pollution Control Agency (MPCA), conducted an inspection of PWP in Cannon Falls. He was accompanied by four Goodhue County employees.<sup>12</sup> Mr. Boeck took notes during the inspection<sup>13</sup> and also took photographs of various items he observed.<sup>14</sup>

10. During the inspection, Mr. Boeck observed an extinguished burn pile that included items from both home and business, such as a garage door, a mattress, paint cans, painted wood, fiberglass, oil filters, metal, paint buckets (one- and five-gallon), hydraulic hoses, carpet, an aerosol can, shingles, and two tires. There also appeared to be paint shavings in the pile. He estimated that there were approximately 20 cubic yards of ash and solid waste in the burn pile. Mr. Hernke told Mr. Boeck that he was burning the items containing both metal and wood in order to recover the metal, and he was later going to recycle the metal. In Mr. Boeck's experience, it is typically not legal to burn these types of items. Items other than clean wood and vegetation have the potential when they are burned to produce chemicals like dioxin, which is a human carcinogen, as well as other toxic air pollutants.<sup>15</sup>

11. PWP uses Gibson Sanitation to handle its solid waste. A dumpster was located on the property on the day of the inspection.<sup>16</sup>

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<sup>8</sup> Testimony of Gegen.

<sup>9</sup> Testimony of Gegen; see Material Safety Data Sheet for lacquer thinner attached to Ex. Q.

<sup>10</sup> Testimony of Hernke, Gikas.

<sup>11</sup> Testimony of Boeck.

<sup>12</sup> Testimony of Boeck; Ex. P.

<sup>13</sup> Testimony of Boeck; Ex. O.

<sup>14</sup> Testimony of Boeck; Exs. A-N.

<sup>15</sup> Testimony of Boeck; Ex. Z; see also Minn. Stat. § 88.171. The burn pile and ash are shown in Exs. J2, J4, K1-4, L1-4, M1-4, N1, N3, and N4.

<sup>16</sup> Testimony of Boeck; Exs. O, R.

12. Mr. Boeck did not observe any discoloration of surface water during his inspection.<sup>17</sup>

13. Mr. Boeck saw six unlabeled 55-gallon containers outside on the property that Mr. Hernke informed him contained used oil. Five of the containers were stored on a concrete slab, and the other container was stored on a wooden pallet over bare ground.<sup>18</sup> Mr. Boeck noticed oil on the side of one of the drums and a small amount of oil on the concrete slab next to the drum.<sup>19</sup> Mr. Hernke told Mr. Boeck that used oil was taken to an automotive business where it was used as heating fuel. PWP did not have any records relating to the disposal of used oil.<sup>20</sup>

14. Mr. Boeck observed a sandblasting pad with built-up sandblast media waste during his inspection. Mr. Hernke informed Mr. Boeck that PWP generated approximately 100-125 tons of sandblast media waste each year on projects performed both on the Cannon Falls property and at other locations. Most of the used sandblast media was left at remote job sites. If sandblasting was performed on the Cannon Falls property, PWP disposed of the waste sandblasting media as “clean fill” on the property. Mr. Hernke did not have any records relating to that disposal.<sup>21</sup>

15. Sandblasting media is classified by the MPCA as an industrial solid waste, not as “clean fill.” Accordingly, a property owner who wants to use waste sandblast media as fill on his or her own property would first be required to obtain a permit from the MPCA.<sup>22</sup> Although sandblasting media is not hazardous in itself, it could become hazardous if it is applied to items that contain hazardous substances (such as lead or other heavy metals). Landfills often require that used sandblast media be tested or impose other requirements to ensure that it is not hazardous before they will accept it.<sup>23</sup>

16. During the inspection, Mr. Boeck asked Mr. Hernke how he managed paint waste. Mr. Hernke told him that he placed old paint outside on a plastic tarp to allow it to cure, then disposed of the container in the dumpster as solid waste. Mr. Boeck incorrectly understood that Mr. Hernke also placed thinner outside on a plastic tarp to allow it to evaporate prior to throwing the container away. Mr. Hernke told Mr. Boeck that used paint filters were disposed of in the dumpster on the property. He stated that he did not dispose of the used fluid (mineral spirits) in the parts washer but re-used it and continually added more fluid. The material that settled down to the bottom of the parts washer (characterized as “paint sludge” by the MPCA and “cured paint” by PWP) was managed as solid waste. To clean paint guns, Mr. Hernke indicated that he ran spirit thinner through the gun and sprayed it into a pail. Mr. Boeck incorrectly understood that Mr. Hernke then set the pail outside until the thinner

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<sup>17</sup> Testimony of Boeck.

<sup>18</sup> Testimony of Boeck. The used oil containers are shown in Exs. C4, H1, H2, and I3.

<sup>19</sup> Testimony of Boeck; Exs. H1, H2, and H3.

<sup>20</sup> Testimony of Boeck.

<sup>21</sup> Testimony of Boeck; Ex.O. The built-up area of sandblast media waste is depicted in Exs. C1, J1, J3, and J4.

<sup>22</sup> Testimony of Boeck.

<sup>23</sup> Testimony of Boeck, Gikas.

evaporated.<sup>24</sup> In fact, as noted in Finding No. 5 above, Mr. Hernke has never left solvent in an uncovered can or laid out solvents so the contents would evaporate.<sup>25</sup>

17. Mr. Boeck noticed a small quantity of “floor dry” on the floor in the main building. Although the floor dry observed during the inspection had been used to absorb vomit and not oil, Mr. Hernke also used floor dry to absorb any oil he spilled on the floor. Mr. Hernke told Mr. Boeck that he used one or two bags of floor dry a year, and that he disposed of floor dry waste in the dumpster on the property.<sup>26</sup>

18. After the inspection, Goodhue County issued a cease and desist order with respect to the Cannon Falls property. As of the date of the hearing, that order had not been lifted.<sup>27</sup>

### **Alleged Violations Letter and Response**

19. On December 10, 2008, Mr. Boeck sent PWP an Alleged Violations Letter based on the November 19, 2008, inspection. The letter asserted that PWP had committed various violations of the hazardous waste rules (specifically, that PWP had failed to evaluate wastes generated as part of business operations to determine if they were hazardous within 60 days of initially generating the waste; failed to properly label six 55-gallon containers of used oil; failed to store one of the containers on a surface that was reasonably impervious to used oil; and failed to ensure that the off-specification used oil PWP transported was delivered to an off-specification used oil burner facility with an identification number). The letter further alleged that PWP had violated the air quality rules by failing to calculate PWP’s potential to emit in order to determine if an air quality permit was needed for its commercial painting activities. Finally, the letter asserted that PWP had violated the solid waste rules by failing to ensure that solid waste was properly transported to and disposed of at a permitted landfill and by failing to obtain a solid waste permit for the disposal of solid waste.<sup>28</sup>

20. The Alleged Violations Letter required that PWP immediately cease burning solid waste and cease disposing of any additional solid waste, including sandblast media, at its Cannon Falls location or any other unpermitted solid waste facility. The letter also required that PWP immediately evaluate its paint-related wastes, waste parts-washer solvent, waste paint booth filters, and used floor dry generated as part of its business operations to determine if they were a hazardous waste, and refrain from disposing of any of these materials until the evaluations had been completed to ensure proper management. PWP was asked to identify any inaccuracies or incorrect information in the letter, provide PWP’s intended response to the corrective action

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<sup>24</sup> Testimony of Boeck, Hernke; Exs. O, R.

<sup>25</sup> Testimony of Hernke.

<sup>26</sup> Testimony of Boeck, Hernke; Exs. O, R.

<sup>27</sup> Testimony of Boeck, Hernke.

<sup>28</sup> Ex. P.

requirements, and provide additional information in response to specific inquiries within ten days of receipt of the letter.<sup>29</sup>

21. PWP's response to the Alleged Violations Letter was received by the MPCA on December 18, 2008.<sup>30</sup> In its response, PWP asserted that a number of false statements were contained in the Alleged Violations Letter. PWP indicated that much of the paint it uses is latex, which is not hazardous, and pointed out that it does not handle lead paint projects. When a solvent-based material was used, PWP stated that the left-over quantities were either recycled or left in a closed container to "cure out." PWP indicated that it had been informed by paint manufacturers that cured paint can go into a landfill and that all solvents were evaporated after curing. PWP indicated that the parts washer in its shop was used very little, and the solvent in it was the same material that was in it when PWP bought the washer in 2005. PWP stated that it did not have a paint booth, but acknowledged that it had a portable curtain in its shop and that it occasionally painted some agricultural equipment, truck frames, or small trailers in that location. It maintained that 95% of its work was performed off site and there was no need for an air quality permit. PWP also asserted that it used very little floor dry; its used oil containers were normally stored in a shed on concrete and had been placed outside for a licensed used oil company to pick up; and it used a non-hazardous, environmentally safe product for sandblasting that had been recycled from coal.<sup>31</sup>

22. With its response to the Alleged Violations letter, PWP provided copies of Material Safety Data Sheets (MSDS) for Black Diamond abrasives (all grades), Sherwin-Williams Acrolon acrylic polyurethane, Sherwin-Williams Mineral Spirits, and Sherwin-Williams Lacquer Thinner. According to the MSDS information, the Acrolon acrylic polyurethane hardener PWP used had a flash point greater than 200 degrees Fahrenheit and waste from the product was not hazardous as defined under the Resource Conservation and Recovery Act (RCRA). The mineral spirits used by PWP had a flash point of 100 degrees Fahrenheit and was classified as combustible. The MSDS sheet indicated that waste from this product "may be hazardous" as defined by RCRA and should be disposed of in accordance with applicable federal, state, and local pollution regulations. The lacquer thinner used by PWP had a flash point of 3 degrees Fahrenheit and was classified as extremely flammable. Sections 12-14 of the MSDS for the lacquer thinner (relating to ecological information, disposal considerations, and transport information) were not included in the copy of the MSDS provided by PWP.<sup>32</sup>

23. With its response, PWP also provided a copy of an open burning permit that had been issued to Mr. Hernke. The permit indicated that Mr. Hernke could burn three piles of piled brush or other dry vegetative material, less than 20-feet by 20-feet or smaller in size, and specified that no more than three piles could be ignited at any one time. As part of the permit, Mr. Hernke agreed not to burn any prohibited materials, which were defined by the permit to include "oils, rubber, plastics, tires and chemically treated materials such as railroad ties, treated lumber, composite shingles, tar paper,

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<sup>29</sup> Ex. P.

<sup>30</sup> Ex. R at 15.

<sup>31</sup> Testimony of Hernke, Boeck; Ex. Q.

<sup>32</sup> Attachments to Ex. Q.

insulation, composition board, sheet rock, wiring, paint, hazardous and industrial waste.”<sup>33</sup>

## **MPCA Forum and Notice of Violation**

24. The MPCA uses a forum process in cases that it believes are appropriate to consider for enforcement. The forum with respect to PWP was composed of MPCA staff working in the areas of solid waste, hazardous waste, and air quality since all three areas were involved in the case.<sup>34</sup> A Case Development Form drafted by Mr. Boeck and Jon Gegen (a Pollution Control Specialist and hazardous waste inspector with the MPCA) summarizing their concerns relating to the November 19, 2008, inspection was distributed to forum members on December 31, 2008.<sup>35</sup>

25. The initial forum meeting was held on January 7, 2009. At that time, the members of the group discussed the case and determined that a Notice of Violation letter would be issued to determine if the sandblast media was hazardous. The forum decided that PWP would be required to hire a qualified consultant to collect samples and prepare a plan describing how future jobs would be evaluated, and that it would meet again after the test results were submitted.<sup>36</sup>

26. On February 2, 2009, the MPCA sent PWP a Notice of Violation letter alleging that PWP had violated various Minnesota statutes and rules relating to proper disposal of solid waste; proper evaluation, handling, and disposal of hazardous waste; and the calculation of potential to emit air pollutants. The letter further alleged that PWP had failed to apply for an industrial storm water permit or develop a storm water pollution prevention plan as required by Minn. R. 7090.3010, subp. 1, and 7035.2870, subp. 5(K).<sup>37</sup>

27. The Notice of Violation letter set forth a number of corrective actions that would be required to address the alleged violations. Among other things, the letter required PWP to immediately cease burning solid waste for metal recovery or disposal; remove metal and ash from the burn pile area and dispose of it properly; cease disposing of waste solvent from its painting and paint gun cleaning operations by evaporation; and cease disposing of floor dry that contained used oil as a solid waste. PWP was also required to submit to the MPCA within 45 days a plan and sampling schedule prepared by a qualified environmental consultant describing how representative samples of the spent blast media located on the Cannon Falls site would be collected and analyzed to determine if it were hazardous waste. After the plan was approved by the MPCA, the samples were to be collected and the results submitted to the MPCA. PWP was further required to develop and submit to the MPCA plans describing how all solid waste, spent sandblast media, and other materials would be

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<sup>33</sup> Attachment to Ex. Q.

<sup>34</sup> Testimony of Boeck; Ex. R at 15.

<sup>35</sup> Testimony of Boeck; Ex. R at 15.

<sup>36</sup> Ex. R at 13.

<sup>37</sup> Testimony of Boeck; Ex. S.

managed in the future, whether generated on the Cannon Falls property or at remote locations.<sup>38</sup>

### **Omni Report, PWP Corrective Action Plans, and MPCA Response**

28. PWP retained Omni Environmental, Inc., for assistance in responding to the Notice of Violation letter and implementing the required testing and corrective action. PWP also engaged Leisch Associates to handle the air quality permitting issues.<sup>39</sup>

29. Omni personnel sampled the ash pile and the sandblasting sand and submitted the samples for laboratory evaluation for TCLP RCRA metals<sup>40</sup> and volatile organic compounds (VOCs). By letter dated February 12, 2009, Omni submitted a report and the testing results to the MPCA. Omni stated that the ash pile would be excavated and sent to an approved landfill after additional testing was conducted.<sup>41</sup>

30. With respect to TCLP metals, the laboratory test results indicated that 1.1 mg/L of barium was detected in the sandblasting sample, and 1.2 mg/L of lead was detected in the ash sample. The lowest concentration of these substances that could be detected by the analysis was 1.0 mg/L with respect to barium and 0.50 with respect to lead.<sup>42</sup> Small quantities of VOCs were present in the ash sample, specifically toluene (1.6 ppm), m,p-xylene (2.9 ppm) and methyl isobutyl ketone (3.7 ppm). The lowest concentration of these substances that could be detected by the analysis was 0.81 ppm, 1.6 ppm, and 1.6 ppm, respectively.<sup>43</sup> In its report and testimony, Omni indicated that the VOCs were barely above the detectible limits, no significant metals were detected in the samples above naturally occurring levels, and Minnesota soils have been determined to have native quantities of lead up to 93 ppm.<sup>44</sup>

31. Omni's February 12, 2009, report disagreed with the MPCA's assertion that PWP had used evaporation to manage solvent waste. According to Omni, all paint-contaminated solvents used to clean the paint gun had been stored in a closed system container (a 5-gallon bucket with lid). Once the solvent/paint mixture settled, the solvent rose to the top and was skimmed off and reused, and very little evaporation took place. Omni noted that PWP had submitted an application to become licensed as a very small quantity hazardous waste generator for the spent parts-washing solvent and would have a certified disposal company pick up any waste.<sup>45</sup>

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<sup>38</sup> Testimony of Boeck; Ex. S.

<sup>39</sup> Testimony of Hernke, Gikas; Ex. U at 5.

<sup>40</sup> These metals include arsenic, barium, cadmium, chromium, lead, mercury, selenium, and silver. TCLP refers to Toxicity Characteristic Leaching Procedure, a federal EPA testing method used to characterize wastes as hazardous and nonhazardous. RCRA refers to the federal Resource Conservation and Recovery Act.

<sup>41</sup> Ex. T; Testimony of Gikas.

<sup>42</sup> Ex. T at 13.

<sup>43</sup> Ex. T at 15.

<sup>44</sup> Ex. T; Testimony of Gikas.

<sup>45</sup> *Id.*



32. Omni's report indicated that the sandblasting media that had been used on-site would be further evaluated and disposed of at an approved landfill if necessary, and the used sandblasting media from two future projects would be evaluated to assure that the media was not a hazardous waste. In Omni's opinion, the likelihood of the blast media containing hazardous amounts of metals was slim unless PWP sandblasted lead-based paint surfaces. Attached to the Omni report was a summary of the PWP responses to the required MPCA corrective actions, laboratory testing results, a calculation of PWP's potential to emit, information relating to abrasive blasting, and Material Safety Data Sheets relating to the Black Diamond sandblasting media.<sup>46</sup>

33. The two Material Safety Data Sheets for Black Diamond abrasives submitted by PWP and Omni indicated that, "[i]f material has been used for abrasive blasting, the waste material may be contaminated from the blasting." The sheets stated that the Black Diamond material "[m]ay be disposed of in an approved landfill in accordance with all EPA, state, and county disposal regulations," but warned that "[d]isposal requirements may change once material has been used for abrasive blasting."<sup>47</sup>

34. With respect to the calculation of PWP's potential to emit pollutants into the air, Omni expressed the opinion that no permit was needed for outdoor painting and that the potential to emit at the property line for the minor amount of particulate used at the site for sandblasting was insignificant. Omni further indicated that four 55-gallon drums labeled for paint filters, used oil, used oil floor dry and used oil filters would be placed at the site.<sup>48</sup>

35. On March 3, 2009, Omni submitted a Corrective Action Response Plan on behalf of PWP. The submission indicated that there were two areas on the Cannon Falls property where sandblasting media had been used as fill. Area 1 was approximately 60 feet by 25 feet with an average thickness of 1 foot, amounting to approximately 50 to 55 cubic yards of sand blasting material. Area 2 was approximately 35 feet by 30 feet with an average thickness of 1 foot, amounting to approximately 35 to 40 cubic yards. This represented all of the sandblasting material that was used at the site over the past five years. Omni indicated that the previously submitted testing results analyzed a composite sample of the sand from both areas for RCRA metals, and reiterated that only barium at 1.1 ppm was present in the samples. Omni asserted that barium is naturally occurring at 34 ppm in the United States, and that the EPA soil screening level for barium is 330 ppm.<sup>49</sup> The MPCA did not dispute the accuracy of this testimony.

36. Omni further asserted in the March 3, 2009, response that PWP only used 30 gallons of paint/solvent mixture per year at the property, and as a result the amount of VOCs emitted outdoors was insignificant and no air permit was needed.<sup>50</sup> Although

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<sup>46</sup> *Id.*

<sup>47</sup> Attachments to Exs. Q and T.

<sup>48</sup> Ex. T; Testimony of Gikas.

<sup>49</sup> Ex. U at 2.

<sup>50</sup> Ex. U at 4.

Omni acknowledged that an industrial storm water pollution prevention plan may have been required at the site during times that sandblasting material was used as fill at the site, it contended that such a plan would not be required once the sand and ash were removed.<sup>51</sup> The letter confirmed that PWP had obtained a hazardous waste identification number.<sup>52</sup>

37. The March 3, 2009, Corrective Action Response Plan also set forth PWP's proposed sampling and clean-up plan activities for MPCA approval. The submission indicated that the clean-up date would be around March 20, 2009. In the letter, PWP proposed to:

- excavate the ash pile and transport it to the SKB Landfill in Rosemount following completion of a profile form, screen the ash for organic vapors using a photo ionization detector (PID) at the request of the landfill, and conduct additional VOC testing if PID readings indicate the presence of VOCs;
- sample the native soil after the ash was removed to ensure that no TCLP RCRA Metals or VOCs had leached into the underlying soil;
- ensure that no evaporation of solvents occurred except what naturally evaporates when loading paint guns;
- label and use 55-gallon drums for all hazardous waste generated at the site (used oil, used oil-impacted floor dry, used oil filters, and parts-washing solvents used for cleaning tools) and have the drums picked up when full and disposed of by a licensed disposal company;
- remove sandblasting material used as fill in two areas of the Cannon Falls property and haul it to SKB landfill in Rosemount;
- conduct testing of one composite sample of material from each of the two areas to assure the landfill that no metals were present and, if metals were detected, collect two soil samples from each of the two excavation areas to confirm the effectiveness of the excavation;
- complete an Option D Air Permit for the sandblasting material;
- conduct testing for TCLP RCRA metals in composite samples of the sandblasting material at two off-site projects and one on-site project over the following six months;
- submit paint filters for TCLP RCRA metal analysis and, if they contain elevated levels of metals, dispose of them as hazardous waste;

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<sup>51</sup> Ex. U at 4-5.

<sup>52</sup> Ex. U at 5.

- submit a Notification of Regulated Waste Activity and become licensed as a very small quantity hazardous waste generator;
- contact a certified disposal company to handle disposal of used parts-washing solvents;
- place all paint-related material and all paint-related waste generated as part of the paint cleaning operation in containers that were properly labeled as hazardous and store them in a secure location, and contract with Safety Kleen to handle the disposal of parts-washing solvent and other hazardous waste;
- have Edel Waste Oil pick up used oil, used oil filters, and used oil-contaminated floor dry and maintain appropriate documentation; and
- remove sandblasting material immediately following all future sandblasting events prior to any rainfall, clean up sand immediately after each painting job, and dispose of the sand in an industrial waste landfill.<sup>53</sup>

38. After requesting and receiving further information from PWP, the forum met again on March 4, 2009. The members of the group determined that further review of the sampling plan proposed by PWP was necessary. At this point, the forum decided that it would be appropriate to issue an Administrative Penalty Order to PWP.<sup>54</sup>

39. On March 16 or 17, 2009, PWP submitted to the MPCA pictures of the labeled waste barrels it would be using for hazardous waste.<sup>55</sup>

40. On April 1, 2009, the MPCA sent a response to PWP commenting on certain portions of the proposed March 3, 2009, corrective action plan and requesting some additional information and documentation. Among other things, the MPCA asked that PWP describe how VOCs came to be located in the ash material, if known; requested that PWP submit additional information regarding how its solid waste would be managed; and asked that PWP either submit test results from the paint booth filters or agree to manage them as hazardous waste.<sup>56</sup>

41. At the hearing, Omni acknowledged that methyl isobutyl ketone is found in parts washer but noted that the VOCs detected in the ash sample could just as easily come from fire-starting accelerants or laboratory contaminants. In Omni's opinion, the levels of VOCs found in the ash were very low and were insignificant in terms of human health risks.<sup>57</sup>

42. On or about May 5, 2009, Omni Environmental provided the MPCA with an Additional Corrective Action Response Completion Report on behalf of PWP. In the

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<sup>53</sup> Ex. U at 2-6.

<sup>54</sup> Testimony of Boeck; Ex. R at 13, 15.

<sup>55</sup> Ex. V.

<sup>56</sup> Ex. W.

<sup>57</sup> Testimony of Gikas.

report, Omni indicated that its personnel had overseen the removal of approximately 15 cubic yards of ash from the ash-pile area at the property and described the sampling, testing, and disposal that occurred. The laboratory results indicated that VOCs were not present in the soil beneath the ash pile. Low concentrations of barium were detected (0.46 ppm and 0.57 ppm), which Omni asserted were well below the MPCA's Tier 1 Soil Leaching Value of 822 ppm. No other metals were detected in these samples. Omni personnel also stated that it had overseen the removal of 19 or 20 tons of used sandblasting material that was sent to the SKB Landfill. Two composite samples were collected from each of the areas excavated, and no significant metals were detected above naturally occurring levels. Omni also sampled the sandblasting material at one off-site location, and the results indicated that RCRA metals were not present. Two tons of the off-site material was subsequently excavated and was accepted by the SKB Landfill. A portion of a used paint booth filter was sampled and no RCRA metals were detected. Finally, Omni noted that an application had been submitted to the MPCA on behalf of PWP for an air permit for particulate discharge and was under review by the Agency. Supporting documentation was submitted with the report, including copies of the load tickets from SKB Industrial Waste for three loads of ash and sand delivered on April 22 and 24, 2009. PWP paid \$231.14, \$259.85, and \$280.07, or the total amount of \$771.06, to dispose of this waste.<sup>58</sup>

#### **MPCA Calculation of Penalty and Issuance of Administrative Penalty Order**

43. On May 6, 2009, the MPCA forum met again regarding PWP. At that time, the forum considered a draft Administrative Penalty Order (APO) Penalty Calculation Worksheet prepared by Mr. Boeck and Mr. Gegen to be used in determining the appropriate penalty amount. The forum made revisions that were incorporated in the final version of the worksheet. The forum members determined that the failure to obtain a permit would be included in the air quality violations, and PWP would be required to submit information needed for that permit and also apply for a hazardous waste license. The allegations that PWP needed an industrial storm water permit and had to develop a storm water pollution prevention plan were dropped.<sup>59</sup>

44. The MPCA's Penalty Calculation Worksheet incorporates the factors to be considered under Minn. Stat. § 116.072, subd. 2. MPCA Appendix V-7 and Appendix II-13 also provide guidance for determining the appropriate penalty amount.<sup>60</sup>

45. In calculating the base penalty, the Worksheet uses a matrix to determine whether the potential for harm to humans, animals, air, water, land, or other natural resources was minor, moderate or severe (set out on the vertical axis of the matrix, labeled "Potential for Harm"), and whether the deviation from compliance was minor,

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<sup>58</sup> Ex. X.

<sup>59</sup> Testimony of Boeck; Ex. R at 13; Ex. DD. Ex. Y is the final version of the Penalty Calculation Worksheet as approved by the forum.

<sup>60</sup> Testimony of Boeck; Exs. AA and BB.

moderate, or severe (on the horizontal axis of the matrix, labeled “Deviation from Compliance”):<sup>61</sup>

		Deviation from Compliance		
		Minor	Moderate	Major
<b>Potential for Harm</b>	<b>Major</b>	\$5,000 to \$2,000	\$8,000 to \$3,500	\$10,000 to \$5,000
	<b>Moderate</b>	\$2,000 to \$500	\$3,500 to \$1,000	\$5,000 to \$2,000
	<b>Minor</b>	\$500 to \$0	\$1,000 to \$200	\$2,000 to \$500
		{BASE PENALTY RANGE}		

46. The worksheet permits the base penalty to be adjusted (enhanced or mitigated) for willfulness or culpability, history of past violations, economic benefit gained from the violation, and other factors as justice may require.<sup>62</sup>

47. As finalized by the forum, the worksheet identified four groups of violations committed by PWP.<sup>63</sup> The forum deemed the violations as a whole to be serious for the following reasons:

In the solid waste program, disposal of waste by burning is considered the most serious unpermitted disposal violation because burning the waste causes air pollution and because it generates ash that may contain hazardous constituents. In this case, smoke from the burning evidently caused nuisance conditions that resulted in a complaint, and the material that was burned consisted of materials prohibited from open-burning.

In the hazardous waste program, failure to evaluate wastes to determine if they are hazardous is a serious violation. In this case, the Regulated Party failed to evaluate a number of different wastes including waste paint related material, waste sandblast media, waste parts washer solvent sludge and waste paint booth filters. Evaporating hazardous waste solvent is also a serious violation. The hazardous waste solvent should have been properly stored and it should have been managed by a licensed hazardous waste transporter and disposed of at a facility that is

<sup>61</sup> Testimony of Boeck; Ex. Y at 6.

<sup>62</sup> Ex. Y.

<sup>63</sup> Ex. Y.

authorized to accept hazardous waste. Failure to follow these measures could lead to environmental harm and threats to human health.<sup>64</sup>

48. The forum did not consider any of the violations to be repeated in nature. In fact, the November 2008 inspection was the MPCA's first regulatory contact with PWP.<sup>65</sup>

49. The first group of violations related to PWP storing and disposing of solid waste without first obtaining a permit. The forum determined that the potential for harm associated with these violations was moderate, for the following reasons:

Potential for harm for operation of this unpermitted site is considered moderate considering the amount of solid waste and ash observed. The Regulated Party has been operating this site since 1994 and does not have documentation for any disposal of sandblast media which it has been generated [sic] through the years. As a result, a considerable amount of waste may have been buried/stored at the Facility or left at job sites. The amount of burnt waste observed also demonstrates that a large amount of waste may have been burned and the ash left on the site, although the burning has taken place on an intermittent basis. Burning waste, rather than properly disposing [of] that waste at a permitted facility, poses danger to both public health and the environment. The uncontrolled burning of waste puts pollutants directly into the air, and in this case caused nuisance conditions that warranted a complaint.

The forum found that the deviation from compliance was major:

The deviation from compliance is major because burning smoke-producing solid waste violates both MPCA and DNR regulations. The Regulated Party also left the ash on site. The Regulated Party also left sandblast media on the site and at remote sites where it was working.

The base penalty for the first group of violations was found to be \$3,500.<sup>66</sup>

50. The second group of violations involved PWP's failure to evaluate potentially hazardous wastes other than used oil (specifically, waste paint-related material, waste sandblast media, waste parts-washer solvent sludge, and waste paint booth filters) within 60 days to determine if they were a hazardous waste. These wastes were stored on site, evaporated, or disposed of with solid waste. The forum found that the potential for harm associated with the second group of violations was moderate:

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<sup>64</sup> Ex. Y at 1.

<sup>65</sup> Testimony of Boeck; Ex. Y at 2.

<sup>66</sup> Ex. Y at 2.

The potential for harm is moderate because the Regulated Party failed to evaluate a number of wastes . . . and allowed solvent to evaporate as a management method. In most cases, the unevaluated materials were disposed of as solid waste, which has a lower potential for harm than other uncontrolled forms of disposal. However, solid waste is not managed in the same way as hazardous waste, and (depending on the facility used) could result in a release of hazardous waste constituents to the environment or exposure of solid waste management personnel to hazardous wastes. The Regulated Party's employees were not aware they were handling a hazardous waste and may have been exposed to hazardous waste constituents due to evaporation of solvent waste. With regard to the evaporated waste, a moderate potential for harm is appropriate because the Regulated Party did reuse solvents, reducing the amount of waste solvent generated and evaporated, and the amount was relatively small.

The deviation from compliance was deemed to be major, for the following reasons:

The Regulated Party failed to evaluate numerous waste streams resulting in mismanagement to occur [sic]. The Regulated Parties [sic] disposal of hazardous waste by evaporation is a major deviation from compliance because the central goal of the hazardous waste management program is to ensure the proper disposal of hazardous wastes.

The base penalty for the second group of violations was determined to be \$3,500.<sup>67</sup>

51. The third group of violations involved PWP's mismanagement of used oil and used oil-contaminated media, as well as its failure to apply for a generator identification number and license. In the worksheet, the latter violation is characterized as one that is a "relatively minor and typically forgivable violation." The forum found that the potential for harm with respect to these violations was minor:

The violation that had the greatest potential to affect the environment was the failure to store a container of used oil on a surface that is relatively impermeable to used oil. In addition, small amounts of used oil floor dry was [sic] being disposed of into the solid waste.

The deviation from compliance was found to be moderate, for the following reasons:

The Regulated Party did not apply [to] have a generator ID/license and was therefore unaware of its regulatory obligations and did not comply with numerous requirements for a number of years. However, moderate seems appropriate because although the Regulated Party failed to properly label its used oil and used oil filter containers, these wastes were being stored in proper containers, and the used oil containers were all

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<sup>67</sup> Ex. Y at 2-3.

stored closed. In this case, only one used oil container stored was outdoors on a pallet over bare ground. The other used oil containers were stored on a concrete pad and all of the used oil containers, although not labeled, were stored closed.

A base penalty of \$600 was recommended for the third group of violations.<sup>68</sup>

52. The fourth group of violations involved PWP's failure to apply for an air quality permit and submit emissions inventory information. The forum determined that this group of violations was minor in terms of both its potential for harm and its deviation from compliance:

There is a minor potential for harm associated with these violations. Although the regulatory thresholds are triggered, the Regulated Party generates low volumes of air pollutants. The Registration Permit ensure[s] that the MPCA is tracking the activities of the Regulated Party, but does not generally change permitted emission levels. Similarly, the deviation from compliance is considered to be minor for the failure to get these types of approvals.

The recommended base penalty was \$250.<sup>69</sup>

53. In finalizing the APO Penalty Calculation Worksheet, the forum also addressed the enhancement or mitigation of the base penalty by considering the factors of willfulness/culpability, history of past violations, other factors as justice may require, and economic benefit. They determined that a 15% willfulness enhancement of the total base penalty of \$7,850 (for all four groups of violations) was appropriate for the following reasons:

The solid waste violations should be enhanced because the Regulated Party knew or should have known that it was not legal to burn solid waste or leave it on its facility grounds. The Regulated Party has stated that garbage service has been used at the Facility since 1994 and therefore knows or should have known that solid waste requires proper management. During the November 19, 2008 inspection, MPCA staff observed one dumpster at the Facility. The Regulated Party stated that Gibson Sanitation provides service to the Facility. The Regulated Party understands that there are proper methods to handle waste generated at the Facility and had an opportunity to use a garbage collection service but still chose to mismanage waste by burning and/or burying. In addition, the Regulated Party conducts painting operations and should know paint related wastes can be hazardous and should have been properly managed.<sup>70</sup>

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<sup>68</sup> Ex. Y at 3-4.

<sup>69</sup> *Id.* at 4.

<sup>70</sup> *Id.*



54. The forum did not apply any further enhancement or mitigation based on “other factors as justice may require.”<sup>71</sup>

55. The forum also enhanced the penalty by \$313.86 to reflect economic benefit gained by PWP from the violations. The Worksheet provided the following reason for selecting this amount:

The Regulated Party has avoided the disposal costs of bulky items (such as a mattress) and some of the other solid waste in the burn pit. However, the Regulated Party will be required to dispose of the ash and unburned waste (15 yards of ash). The difference between the avoided cost and the ash disposal cost is the economic benefit. The MPCA has estimated \$545 for disposal as MSW - \$231.14 (actual cost to dispose of ash) = \$313.86.<sup>72</sup>

56. The forum determined that the penalties for the first and second groups of violations should be treated as non-forgivable since they are considered serious and “[t]he uncontrolled burning of waste puts pollutants directly into the air and not properly disposing of ash can contaminate surface water. A substantial amount of waste, including materials prohibited from open burning, was burned at this site, potentially over a large number of years.” The forum found that the penalties for the third and fourth groups of violations should be considered forgivable.<sup>73</sup>

57. The penalties were summarized in the Penalty Calculation Worksheet as follows:<sup>74</sup>

#### **PENALTY TABLE**

	<b><i>FORGIVABLE</i></b>		<b><i>NON-FORGIVABLE</i></b>	
<b><i>BASE PENALTY</i></b>	\$850		\$7000	
<b><i>WILLFULNESS/CULPABILITY</i></b>	%15	\$127.50	%15	\$1,050
<b><i>HISTORY</i></b>	% 0	\$ 0	% 0	\$ 0
<b><i>OTHER FACTORS</i></b>	% 0	\$ 0	% 0	\$ 0
<b><i>ECONOMIC BENEFIT</i></b>	\$ 0		\$313.86	
<b><i>TOTAL PENALTY</i></b>	\$977.50		\$8363.86	

<sup>71</sup> Ex. Y at 4.

<sup>72</sup> *Id.* at 5.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

58. On May 20, 2009, the MPCA issued an Administrative Penalty Order to PWP. The following statutes and rules were alleged to have been violated:<sup>75</sup>

- PWP failed to obtain a permit for disposal of solid waste, in violation of Minn. Stat. § 116.081, subd. 1, and Minn. R. 7001.0030 and 7001.3050, subp. 1;
- PWP failed to collect and transport solid waste to a permitted solid waste facility, in violation of Minn. R. 7035.0800, subp. 1;
- PWP failed to calculate its potential to emit from its paint booth and sandblasting operation to determine if an air quality permit is required, in violation of Minn. R. 7007.0150, subp. 4;
- PWP failed to apply for an air quality permit prior to constructing or operating its sandblasting and paint booth facility, in violation of Minn. Stat. § 116.081, subd. 1, and Minn. R. 7007.0150;
- PWP failed to submit an annual emission inventory report for each year that air pollutants were emitted and an air emissions permit is required, in violation of Minn. R. 7019.3000, subp. 1;
- PWP failed to evaluate its used oil-contaminated floor-dry prior to disposal, in violation of Minn. R. 7045.0805 (A);
- PWP failed to label six 55-gallon used oil containers located outside its facility and failed to store one of the containers on a surface that is reasonably impervious to used oil, in violation of Minn. R. 7045.0855, subp. 2;
- PWP failed to evaluate waste paint-related material, waste sandblast media, waste parts washer solvent sludge, and waste paint booth filters within 60 days of initially generating the waste to determine if they are a hazardous waste, in violation of Minn. R. 7045.0214, subd. 1;
- PWP failed to properly manage its hazardous waste paint-related material as part of its paint gun cleaning operations, in violation of Minn. R. 7045.0208, subp. 1, and 7045.0665, subp. 1(B);
- PWP failed to apply for a hazardous waste identification number within 75 days after first generating hazardous wastes, in violation of Minn. R. 7045.0221;

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<sup>75</sup> Ex. DD.

- PWP failed to obtain a hazardous waste generator license for its hazardous waste generation activities, in violation of Minn. R. 7045.0225, subp. 1;
- PWP failed to store used oil filters in a leakproof container that was closed and labeled, in violation of Minn. R. 7045.0990, subp. 3;
- PWP failed to test used oil that was to be burned for energy recovery to determine that it is on-specification at least once per source, in violation of Minn. R. 7045.0840(A), 7045.0895, subp. 1, and 7045.0895, subp. 4; and
- PWP failed to keep records of every shipment of used oil leaving the generator site, in violation of Minn. R. 7045.0855, subp. 4.

The APO listed eighteen Corrective Actions to remedy the violations listed in the APO, and noted that the requirements set forth in thirteen of them had already been completed by PWP. The five remaining Corrective Actions involved submission of plans describing how all solid waste generated at the facility in the future would be properly managed and how waste sandblast media would be managed; submission of a completed hazardous waste license application; submission of “any additional information requested by the MPCA regarding its air emissions permit;” and submission of an emission inventory report for past years in which an air emission permit was required. In accordance with the calculations in the Worksheet, the MPCA required PWP to pay a total penalty of \$9,341.36. Of that amount, the MPCA determined that \$8,363.86 was nonforgivable. If PWP performed and documented all of the corrective action requirements listed in the APO to the satisfaction of the Commissioner within 30 days after receipt of the APO, the remaining \$977.50 of the penalty was determined to be forgivable.<sup>76</sup>

### **Additional Correction Action Plan**

59. By letter dated June 17, 2009, Omni provided the MPCA with an amended Corrective Action Response Plan with respect to the management, evaluation, handling, sampling and eventual disposal of the used sandblasting media, paint booth filters, and spent paint/solvent mixture.<sup>77</sup>

60. The MPCA raised no objection to the additional corrective action proposed by PWP. PWP was in compliance with all of the corrective action specified in the APO by the date of the hearing or earlier.<sup>78</sup>

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<sup>76</sup> Ex. DD.

<sup>77</sup> Testimony of Boeck; Ex. CC.

<sup>78</sup> Testimony of Boeck, Gegen, Gikas.

## **Additional Findings**

61. On June 17, 2009, PWP appealed the APO and requested a hearing before an Administrative Law Judge.<sup>79</sup>

62. On July 10, 2009, the MPCA issued a Notice and Order for Hearing regarding this matter.

63. PWP has no history of prior violations of MPCA statutes or rules. The November 19, 2008, inspection, was the first time that PWP had ever had any contact with the MPCA.<sup>80</sup>

64. By the time PWP appealed the APO, it had paid more than \$11,000 to Omni Environmental, the testing laboratory, SKB Landfill, and Leisch & Associates (its consultant on the air permit issue).<sup>81</sup> As of the date of the hearing, PWP had incurred total expenses of approximately \$15,000 in connection with this matter, including the costs associated with its retention of legal counsel. Due to the effects of the economic downturn and the cease and desist order imposed by Goodhue County, the proposed monetary penalty set forth in the APO will have a significant detrimental economic impact on the Company.<sup>82</sup>

65. Any Conclusion of Law more appropriately considered a Finding of Fact is hereby adopted as such.

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of the Pollution Control Agency have jurisdiction in this case pursuant to Minn. Stat. §§ 14.57 – 14.62 and Minn. Stat. § 116.072.

2. The Notice of and Order for Hearing in this matter was proper, and all relevant substantive and procedural requirements of law or rule have been fulfilled. This matter is properly before the Administrative Law Judge.

3. Under Minn. Stat. § 116.072, subd. 3, an Administrative Penalty Order must include “a concise statement of the facts alleged to constitute a violation” and “a reference to the section of the statute, rule, ordinance, variance, order, stipulation agreement, or term or condition of a permit or license that has been violated.” The MPCA provided adequate notice of the alleged violations under this provision.

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<sup>79</sup> Appeal letter is attached to the Notice of and Order for Hearing as Exhibit B.

<sup>80</sup> Testimony of Hernke.

<sup>81</sup> See June 17, 2009, Letter from Mr. Hernke attached to Notice of and Order for Hearing.

<sup>82</sup> Testimony of Hernke.

4. The Minnesota Pollution Control Agency has the burden to establish by a preponderance of the evidence that PWP violated applicable laws or rules and that issuance of the Administrative Penalty Order was warranted. If the violations are established, the Administrative Law Judge may not recommend a penalty different in amount than that contained in the Administrative Penalty Order unless the amount of the proposed penalty is determined to be unreasonable, after considering the factors set forth in Minn. Stat. § 116.072, subd. 2(b).<sup>83</sup>

5. Although PWP did not concede that the violations set forth in the Administrative Penalty Order occurred, PWP only provided evidence disputing the underlying factual basis for one of the alleged violations--the allegation that PWP intentionally disposed of solvent by evaporation. PWP further challenges the reasonableness of the penalties imposed in the Administrative Penalty Order.

6. Minn. R. 7045.0665, subp. 1(B), specifies that generators must not dispose of hazardous waste by intentional evaporation. The MPCA has not shown that PWP disposed of solvent by intentional evaporation, and thus has not shown that PWP violated Minn. R. 7045.0665, subp. 1(B).

7. The MPCA has shown that the remainder of the violations alleged in the Administrative Penalty Order occurred, and that PWP thereby violated the following statutory and rule provisions:

- Minn. Stat. § 116.081, subd. 1, and Minn. R. 7001.0030, Minn. R. 7035.0800, subp. 1, and 7001.3050 (relating to Violation Group 1);
- Minn. R. 7045.0214, subp. 1, and 7045.0208, subp. 1 (relating to Violation Group 2);
- Minn. R. 7045.0805(A), 7045.0855, subps. 2 and 4, 7045.0221, 7045.0225, subp. 1, 7045.0990, subp. 3, 7045.0840 (A), 7045.0895, subps. 1 and 4 (relating to Violation Group 3); and
- Minn. Stat. § 116.081, subd. 1, and Minn. R. 7007.0150, subps. 1 and 4, and 7019.3000 (relating to Violation Group 4).

8. Under Minn. Stat. § 116.072, the Commissioner has the authority to assess penalties of up to \$10,000 for violations of MPCA regulations. Pursuant to subdivision 2(b) of the statute, the Commissioner may consider the following factors in determining the amount of the penalty:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;

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<sup>83</sup> Minn. Stat. § 116.072, subd. 6(c).

- (5) the economic benefit gained by the person by allowing or committing the violation; and
- (6) other factors as justice may require . . . .

9. For a repeated or serious violation, the Commissioner may issue an order with a penalty that will not be forgiven after the corrective action is taken, in accordance with Minn. Stat. § 116.072, subd. 5(b).

10. The MPCA has shown that Violations 3 and 4 (relating to PWP's mismanagement of used oil and used oil-contaminated media, failure to apply for a generator identification number and license, failure to apply for an air quality permit, and failure to submit emissions inventory information) were minor in nature and that assessment of a penalty that was forgivable for these violations was appropriate.

11. The MPCA has shown that Violations 1 and 2 (relating to PWP's burning of a substantial amount of waste over a number of years, failure to properly dispose of ash, and failure to evaluate paint waste, waste sandblast media, waste paint booth filters, and waste parts-washer solvent sludge) were serious and that assessment of a penalty that was nonforgivable for these violations was appropriate.

12. In assessing the base penalties and adjustments, the MPCA did not reasonably or appropriately consider all of the factors listed at Minn. Stat. § 116.072, subd. 2. Based upon a consideration of all of the statutory factors, and for the reasons discussed in the attached Memorandum, the penalties assessed by the MPCA against PWP are unreasonable. A nonforgivable penalty of \$4,095 and a forgivable penalty of \$385 are supported by the record in this matter.

13. These Conclusions are reached for the reasons discussed in the following Memorandum, which is hereby incorporated into these Conclusions.

Based upon the above Conclusions, the Administrative Law Judge makes the following:

## **RECOMMENDATION**

IT IS HEREBY RECOMMENDED: That the Commissioner AFFIRM the violations set out in the Administrative Penalty Order issued on May 20, 2009, to Painting With Prep, Inc. with the exception of the alleged violation of Minn. R. 7045.0665, subp. 1(B), but reduce the forgivable portion of the penalty to \$385 and the nonforgivable portion of the penalty to \$4,095.

Dated: November 5, 2009.

s/Barbara L. Neilson

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BARBARA L. NEILSON  
Administrative Law Judge

Reported: Digitally Recorded; Not Transcribed.

## **NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least five days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Paul Eger, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155-4194 (651-296-6300) to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

## MEMORANDUM

### Legal Standard

This matter arises under Minn. Stat. § 116.072, which authorizes the Commissioner of the MPCA to issue orders assessing monetary penalties for violations of applicable statutes, rules, and permits, and requiring the violations to be corrected. The statute permits the party receiving an APO to request a hearing to review the APO. It is well established that the Agency bears the burden of showing by a preponderance of the evidence that the alleged violations occurred. With respect to the amount of the penalty, the statute specifies that the Administrative Law Judge may not recommend a change in the amount of the proposed penalty unless the Administrative Law Judge “determines that, based on the factors in subdivision 2, the amount of the penalty is unreasonable.”<sup>84</sup> Those factors are the willfulness of the violation; the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state; the history of past violations; the number of violations; the economic benefit gained by the person by allowing or committing the violation; and other factors as justice may require.<sup>85</sup>

### Preliminary Issues

The MPCA argued during the hearing and in its post-hearing brief that only the reasonableness of the penalty imposed could be addressed in this proceeding, and not whether the alleged violations in fact occurred. The MPCA points out that the June 17, 2009, letter appealing the Administrative Penalty Order only complained about the amount of the penalty and the Notice and Order for Hearing stated under the “Issues” heading that Respondent indicated in his appeal letter that the penalty was unreasonable. Counsel for PWP asserted that PWP did not concede that the alleged violations occurred.

Mr. Hernke’s letter requesting an administrative hearing did focus upon his objections to the amount of the penalty and his view that the violations were not sufficiently serious to warrant imposition of such a severe monetary penalty. However, it appears that he wrote the letter before he retained legal counsel. In addition, Mr. Hernke’s earlier response to the MPCA’s Alleged Violations Letter (Ex. Q) and the letters and reports submitted by Omni Environmental to the MPCA on PWP’s behalf (Exs. T and U) made it clear that PWP also disagreed with certain of the Agency’s allegations, particularly the contention that PWP disposed of solvent by evaporation. Under these circumstances, the MPCA received adequate notice of PWP’s areas of disagreement with the APO, and the Administrative Law Judge concludes that PWP should be allowed to challenge the existence of the evaporation violation as well as the reasonableness of the amount of the penalty in this proceeding.

PWP made the further argument that, since all of the alleged violations have been corrected and none of the violations were repeated or serious, the entire penalty

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<sup>84</sup> Minn. Stat. § 116.072, subd. 6(c).

<sup>85</sup> Minn. Stat. § 116.072, subd. 2(b).



previously levied by MPCA must be forgiven. In the alternative, PWP contends that the matter is moot because the violations have all been corrected, and the penalty should be rescinded.

Minn. Stat. § 116.072, subd. 5(a), states in pertinent part, “Except as provided in paragraph (b), if the commissioner . . . determines that the violation has been corrected or appropriate steps have been taken to correct the action, the penalty must be forgiven.” However, Paragraph (b) of the same statutory provision states: “For a repeated or serious violation, the commissioner . . . may issue an order with a penalty that will not be forgiven after the corrective action is taken.” Because, as discussed below, the Administrative Law Judge agrees with the MPCA that certain of the violations are serious in nature, the entire amount of the penalty need not be forgiven, and this matter cannot be regarded as moot.

## **Violations**

As reflected in the Findings above, the MPCA has shown by a preponderance of the evidence that PWP violated a number of laws and rules relating to air emissions and the handling and disposal of solid waste and hazardous waste. Specifically, the MPCA established that the following violations occurred:

**(1) Violation Group 1:** The MPCA demonstrated that PWP stored and disposed of solid waste without first obtaining a solid waste management permit and failed to ensure that solid waste was collected and transported to an authorized facility. These violations fell within two categories:

(a) First, PWP burned both business and household waste in a burn pile located on the Cannon Falls property. The pile included a number of items that could not be burned under the burn permit obtained by Mr. Hernke or under Minnesota’s opening burning laws<sup>86</sup> (for example, paint, filters, shingles, and tires). Approximately 15 cubic yards of ash were removed from the burn pile area in response to the corrective action ordered by the MPCA. The MPCA inspector described the burn pile as a “larger” pile compared to others he had seen.

(b) Second, PWP spread used sandblast media in two locations on the Cannon Falls property and also left used sandblast media on remote locations where it had performed work. PWP did not have a permit to dispose of the used sandblast media on the Cannon Falls property.

**(2) Violation Group 2:** The MPCA established that PWP failed to evaluate potentially hazardous wastes other than used oil to determine if they were, in fact, hazardous wastes. Instead, PWP stored the waste sandblast media on its Cannon

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<sup>86</sup> Minn. Stat. § 88.171, subd. 2. In addition, subd. 3 of the statute prohibits the open burning of hazardous wastes (defined in Minn. Stat. § 116.06, subd. 11, to include explosives, flammables, oxidizers, poisons, irritants, and corrosives); subd. 6 prohibits conducting salvage operations by open burning; and subds. 4, 5, and 8 prohibit open burning of solid waste generated from an industrial process, demolition debris, and food-related garbage (with certain exceptions).

Falls property or at remote project sites and disposed of waste paint-related material, waste parts washer solvent sludge, and waste paint booth filters with its solid waste.

PWP only provided evidence disputing the underlying factual basis for one of the alleged violations--the allegation that PWP intentionally disposed of solvent by evaporation.<sup>87</sup> As noted in the Findings and Conclusions above, the Administrative Law Judge has concluded that the MPCA did not show by a preponderance of the evidence that PWP disposed of waste solvent by intentional evaporation. Mr. Hernke provided credible and convincing testimony that he did not, in fact, leave solvent in uncovered cans, lay solvents out so the contents would evaporate, or otherwise act to intentionally cause the solvent to evaporate. After running solvent through the paint gun hose and pump and collecting the discharged paint/solvent mixture, Mr. Hernke indicated that he closed the lid on the container immediately. Once the sediment sank to the bottom and the solvent rose to the top, Mr. Hernke poured the solvent off the top and re-used it. He did not leave the lid off of the container or otherwise intentionally cause the solvent to evaporate. Mr. Gikas testified that Mr. Hernke had provided the same description of PWP's approach to him after he was retained as an environmental consultant by PWP. Although PWP did not properly manage the remaining, hardened substance, which likely contained a small amount of solvent, as hazardous waste, the actions PWP took do not amount to intentional evaporation of solvent.

**(3) Violation Group 3:** The MPCA demonstrated by a preponderance of the evidence that, at the time of the inspection, six containers holding used oil and used oil filters were not labeled, one container of used oil was not stored on an impermeable surface, PWP disposed of floor dry contaminated by oil with its solid waste, PWP did not have a hazardous waste generator identification number and license, PWP had not tested the used oil it had generated to ensure it met fuel specifications for oil to be burned for energy recovery, and PWP did not maintain records of shipments of used oil leaving its site.

**(4) Violation Group 4:** The MPCA established that PWP did not calculate its potential to emit air emissions from its paint booth and sandblasting operation to determine if an air quality permit was required, apply for such a permit before constructing or operating its sandblasting and paint booth facility, or submit emissions inventory information on a yearly basis.

### **Assessment of Seriousness**

The remaining issue presented is whether the amount of the penalty is unreasonable based on consideration of the factors set forth in Minn. Stat. § 116.072, subd. 2.

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<sup>87</sup> PWP demonstrated that the "floor dry" observed during the inspection had not, in fact, been used to absorb oil, as the MPCA inspector had assumed. However, Mr. Hernke acknowledged that he also used floor dry to absorb spilled oil and did not dispute that he threw that waste in his dumpster with other solid waste. Accordingly, the MPCA has adequately shown that this alleged violation occurred.

The MPCA has developed a penalty calculation guidance document<sup>88</sup> to guide its staff in assessing penalties. The document requires MPCA staff to first identify any violations that are serious or repeated in nature and thereafter calculate a base penalty for each violation, which is then adjusted for willfulness, history of past violations, economic benefit, and other factors as justice may require.

The MPCA decided that the violations in the first group relating to unpermitted solid waste disposal, particularly disposal by burning, were serious and should be the subject of a nonforgivable penalty. This decision was consistent with the MPCA's solid waste standard guidance document, which specifies:

Disposal of solid waste without a permit is considered serious. Items to consider include the type and amount of waste, the condition of the waste, the length of time the site has been used for unpermitted disposal, and the knowledge the responsible party had. Burning of waste is generally the most serious, followed by burial, and then surface dumping.<sup>89</sup>

The MPCA provided testimony and other evidence (Ex. Z) that disposal of waste by burning is a significant source of air pollution and generates ash that may contain hazardous constituents. By burning waste, PWP caused actual harm to the environment. The amount of ash found on the Cannon Falls property in the area of the burn pile supports the Agency's finding that burning had occurred over many years. The Penalty Calculation Worksheets relating to other cases in which disposal of waste by burning has occurred indicate that the MPCA has also deemed those violations serious in nature and has assessed nonforgivable penalties in those cases as well.<sup>90</sup> In addition, PWP spread a significant amount of used sandblast media on the Cannon Falls property and also left it at remote work sites. Accordingly, the Administrative Law Judge concludes that the Agency has shown that the first group of violations was serious, and reasonably exercised its discretion to assess a nonforgivable penalty for that set of violations.

The MPCA also concluded that the violations in the second group (relating to PWP's failure to evaluate various paint-related waste streams at the facility to determine if they are hazardous) were serious in nature and warranted imposition of a nonforgivable penalty. The Agency emphasized that PWP failed to evaluate waste paint-related material, waste sandblast media, waste parts-washer solvent sludge and waste paint-booth filters, and asserted that the failure to evaluate wastes to determine if they are hazardous is a serious violation. The MPCA also alleged that "[e]vaporating hazardous waste solvent is also a serious violation."

Although, as discussed above, the Administrative Law Judge finds that the intentional evaporation allegation was not supported by the evidence, the Agency did establish that PWP otherwise did not conduct proper evaluation of waste, including the paint-related sludge or hardened material remaining after the paint guns were cleaned,

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<sup>88</sup> Ex. AA.

<sup>89</sup> Ex. BB at 9.

<sup>90</sup> Exs. 5c, 6c, 7c, 8c.

to determine if it was hazardous in nature. The Administrative Law Judge agrees that this evaluation is essential to ensure that hazardous waste is identified and managed in accordance with state and federal law. It is evident that failure to follow proper procedures in evaluating and handling hazardous waste could lead to environmental harm and pose a threat to human health. Accordingly, the Judge finds that the MPCA made a sufficient showing that the second group of violations was serious, and it was within its discretion to assess a nonforgivable penalty for that group of violations.

The MPCA's further determination that the third and fourth group of violations were not serious and that a forgivable penalty should be assessed for those violations is also supported by the evidence.

### **Calculation of Base Penalty**

A base penalty calculation matrix is used by the MPCA to assist staff in selecting a base penalty for violations. According to the MPCA's APO Penalty Calculation Guidance document, the "[g]ravity [of the violation] is determined by the potential for harm (the vertical axis of the matrix) and the deviation from compliance (the horizontal axis of the matrix)."<sup>91</sup> The Guidance directs MPCA staff to rate each violation on each axis as major, moderate, or minor, and provides the following instructions for calculating the potential for harm and the deviation from compliance:

When calculating the potential for harm to humans, animals, air water, land, or other natural resources of the state, consideration should be given to the risk of actual harm caused by the violation or violations. Because many rules and regulations are preventive in nature, the focus is on potential for harm and not on actual harm. Where actual harm from a violation is observed, the potential for harm has been realized and the rating may reflect this fact.

When calculating the deviation from compliance, consideration should be given to the quantity or extent of the violation (i.e., how much, how far) or the extent to which the Regulated Party attempted to prevent the violation. When the position of the violation in the matrix is established, then determine a base penalty from within the applicable range. The amount chosen is discretionary because the matrix is intended to be only a guide.<sup>92</sup>

PWP contended that the emphasis on "potential for harm" to natural resources reflected in MPCA's APO Penalty Calculation Guidance document is at odds with Minn. Stat. § 116.072, subd. 2, which sets forth the factors to be considered in assessing a penalty. In particular, PWP asserts that the reference in Minn. Stat. § 116.072, subd. 2(b)(2), to "gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state" must be interpreted to address only the

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<sup>91</sup> Ex. AA at 3.

<sup>92</sup> *Id.*

“actual” damage to the environment posed by the violation, and not merely its “potential for harm.”

The Administrative Law Judge does not find PWP’s argument to be persuasive. The term “including” is not usually a word of limitation, but has the meaning of “in addition to,” suggesting that the examples given are simply an illustrative application of the general principle.<sup>93</sup> In a 1990 contested case decision involving the same argument made by PWP,<sup>94</sup> another Administrative Law Judge found that the use of the word “including” in Minn. Stat. § 116.072, subd. 2(b)(2), “does not limit a grave violation to one involving actual damage.” In the context of that case (which involved a large quantity hazardous waste generator), it was noted:

A contrary conclusion is unreasonable because it would not allow recognition of potential damage and the quality of the risk created when no actual harm results. The Agency [the MPCA] has rightly authorized a consideration of the quality of the risk created, potential damage, in its Administrative Penalty Memorandum. [Citation omitted.]

It is clear that the violations exposed the environment and individuals near the facility to serious danger and possibility of contamination. The wastes were both flammable and toxic, the plant is located near a water source and other structures are in the near vicinity. Under such circumstances, the fact that no actual harm occurred is only fortuitous. Palm Industries took no precautions to preclude serious damage. They should not now be heard to argue seriously that the lack of actual damage changes the nature of the risk they created. The purpose of an APO is to enforce compliance so that the public and the environment are protected in the future, not to provide compensation for actual damage. Had actual damage occurred, the PCA would not have proposed a base penalty at the low end of the major penalty range or they would have employed a more onerous enforcement mechanism.<sup>95</sup>

Accordingly, it is concluded that the MPCA’s approach in the present matter is consistent with the governing statute, and it properly took the potential for harm into consideration in calculating the base penalty.

With respect to the first group of violations, the MPCA determined that the potential for harm was moderate, based upon the amount of solid waste and ash observed, the amount of burnt waste observed, the lack of records regarding disposal of

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<sup>93</sup> *Black’s Law Dictionary* 687 (5th ed. 1979); *Argo Oil Corp. v. Lathrop*, 72 N.W.2d 431 (S.D. 1955); Order on Motion for Summary Disposition in *Joseph Bieker v. Novartis Nutrition Corp.*, OAH Docket No. 4-1700-12388-2 (2000). In addition, the canons of statutory construction set forth in Minn. Stat. § 645.17 (5) specify that, in ascertaining the intention of the legislature, the courts may be guided by the presumption that “the legislature intends to favor the public interest as against any private interest.”

<sup>94</sup> *In the Matter of the Administrative Penalty Order to Palm Industries, Inc.*, OAH Docket No. 2-2200-5080-2 (1990) (.

<sup>95</sup> *Id.* at 16.

sandblast media generated since 1994, and the fact that the uncontrolled burning of waste puts pollutants directly into the air. The MPCA determined that the deviation from compliance was major because the uncontrolled burning violated both MPCA and DNR regulations, PWP left the ash on site, and PWP left sandblast media on the site and at remote sites where it was working. Under the MPCA's penalty matrix, a moderate potential for harm and major deviation from compliance generally warrants a penalty in the \$2,000 to \$5,000 range. The Agency selected a base penalty in the mid-point of that range (\$3,500).

The MPCA asserted that the \$3,500 penalty assessed in this case for the burning of solid waste was relatively typical for the amount of burning involved. It relied on the volume of waste, the length of time burning had occurred, the burning of items that were identified as prohibited on the burn permit issued to PWP, and the fact that a business was involved. In light of the actual harm to the environment caused by burning and the dumping of unevaluated industrial waste on the property, the Agency argued that it was appropriate to decide that there was at least a moderate potential for harm.

PWP contended that it was treated more harshly than others who have been cited for burning violations. It pointed out that private citizens who engage in open burning typically first receive a letter of warning from MPCA and only receive an APO (typically a \$1,000 forgivable penalty) if they fail to correct the situation within 15 days. However, because the waste burned by PWP included both business and household items, the Administrative Law Judge agrees that it is reasonable to treat PWP differently than a private citizen. PWP also pointed out that Dyrdaahl Lumber initially received a letter of warning from the MPCA even though it was a business.<sup>96</sup> The MPCA explained that, in contrast to PWP's case, the Agency knew of only one occasion when Dyrdaahl had engaged in burning at the time the letter of warning was issued, and Dyrdaahl had not disposed of used sandblast media on its property.

The "moderate/major" base penalty of \$3,500 selected by the MPCA for the first group of violations is identical to the base penalty assessed in three of the comparable cases cited by the MPCA (Dyrdaahl Lumber, Hammel Equipment, and Eagle Transport).<sup>97</sup> The base penalty assessed by the MPCA in the Thielen Construction case (\$2,250) was somewhat lower than that assessed against PWP, based upon the Agency's determination that both the potential for harm and the deviation from compliance were moderate. The Thielen Construction case is distinguishable from PWP's situation, however. The amount of burnt waste observed on Thielen's property was small and there was no sandblast media involved. In addition, Thielen did not dispose of the ash on site but instead used a dumpster, which the MPCA noted was likely protective of the environment. The MPCA indicated that it would have characterized the Thielen violation as a major deviation from compliance if the company had improperly managed the ash.

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<sup>96</sup> See Ex. 7c.

<sup>97</sup> See Exs. 6, 7, and 8.

The Administrative Law Judge concludes that the base penalty of \$3,500 selected for the first group of violations is reasonable.

The MPCA determined that the potential for harm associated with the second group of violations was moderate because PWP “failed to evaluate a number of wastes . . . and allowed solvent to evaporate as a management method.” Although the unevaluated materials were in most cases disposed of as solid waste, which the MPCA acknowledged has a lower potential for harm than other uncontrolled forms of disposal, the forum noted that solid waste is not managed in the same way as hazardous waste. The Agency believed that PWP’s “employees were not aware that they were handling a hazardous waste and may have been exposed to hazardous waste constituents due to evaporation of solvent waste.” With respect to its allegation that PWP evaporated solvents, the MPCA determined that a moderate potential for harm was appropriate because PWP did reuse solvents, which reduced the amount of waste solvent generated and evaporated to a relatively small amount. The MPCA decided that the deviation from compliance associated with the second group of violations was major because the failure to evaluate numerous waste streams allowed mismanagement to occur, and because the disposal of hazardous waste by evaporation is at odds with the central goal of the hazardous waste management program. The base penalty for the second group of violations was again set at \$3,500, in the midpoint of the \$2,000 to \$5,000 range.

The MPCA demonstrated that PWP did not properly evaluate a number of types of materials, including used sandblast media, paint-related sludge, and used paint booth filters, to determine whether or not they were hazardous. PWP was engaged in the painting business, and knew or should have known of the potentially hazardous character of these materials. Mr. Hernke, the only PWP employee working at the Cannon Falls location, took some steps to learn about the materials used, such as reviewing MSDS sheets and talking with paint manufacturer representatives about recommended disposal. PWP also did not use lead paint and did not take on projects that would involve sandblasting items previously painted with lead paint. However, the MPCA demonstrated that there may be hazardous substances other than lead in paint. Ultimately, the steps taken by PWP were not sufficient to ensure proper management of potentially hazardous waste.

As noted above, the MPCA did not show by a preponderance of the evidence that PWP intentionally disposed of solvent waste by evaporation, and it mistakenly relied upon that allegation in calculating the penalty. It appears that the evaporation allegation was a significant part of the determination that the penalty should be at the mid-point of the \$2,000 to \$5,000 range. With that violation removed, the Administrative Law Judge finds that the base penalty for the second group of violations is unreasonable. Accordingly, it is recommended that the penalty for the second group of violations be reduced to \$2,000.

Regarding the third group of violations, the MPCA determined that the potential for harm was minor but the deviation from compliance was moderate because PWP was unaware of its regulatory obligations and did not comply for a number of years.

From the resulting penalty range of \$200 to \$1,000, the Agency selected a base penalty of \$600.

As the MPCA acknowledged, PWP's used oil and oil filters were stored in proper containers and the used oil containers were all stored closed. In addition, all but one of the containers of used oil were stored on a concrete pad. The used oil container sitting on a pallet over bare ground on the day of the inspection was awaiting pick-up by a company that intended to burn it for energy recovery. There is no evidence that any oil had been spilled on the ground from this container. In addition, the forum noted that the requirement to apply for a generator ID/license "is a relatively minor and forgivable violation."<sup>98</sup> Moreover, because Mr. Hernke was the only person who conducted painting work on the Cannon Falls property, it is unlikely that the lack of labels on the barrels caused any confusion or increased the likelihood that improper materials would be placed in them.

For these reasons, the Administrative Law Judge concludes that the forum should have found that the deviation from compliance with respect to the third group of violations was minor rather than moderate, and should have selected a base penalty of \$300. Because it is undisputed that PWP took timely action to correct this violation, this portion of the penalty should be forgiven.

With respect to the fourth group of violations relating to the calculation of the potential to emit and the air permit, the forum found that this group of violations was minor in terms of both its potential for harm and its deviation from compliance, and selected a base penalty of \$250 from the matrix range of \$0 to \$500. The Administrative Law Judge finds the selection of the base penalty for this group of violations to be reasonable. PWP performed the required calculation and applied for a "Registration D" air permit after this issue was raised by the MPCA. Because it appears that PWP took timely action to correct this violation, it should be forgiven.

## **Willfulness**

The forum determined that a 15% enhancement of the total base penalty for all four groups of violations was warranted because garbage service was available but PWP chose to mismanage waste by burning and/or burying it. The MPCA found that PWP "knew or should have known that it was not legal to burn solid waste or leave it on its facility grounds" and should have known that paint-related wastes can be hazardous and must be properly managed. The MPCA also emphasized that the burn permit identified the materials that could be burned, and PWP knew or should have known that burning was not the proper way to dispose of these items.

The APO Calculation Guidance prepared by the MPCA includes the following information regarding consideration of willfulness/culpability:

If the violation seems willful/culpable, an upward adjustment may be warranted. A violation is willful/culpable if: the conduct was apparently

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<sup>98</sup> Ex. Y at 3.



performed with knowledge that it was illegal; the Regulated Party should have reasonably known that the conduct was illegal; or the Regulated Party apparently proceeded with indifference or recklessness as to whether the conduct was illegal. *In addition to consideration of behavior when committing the violation, consideration should also be given to the Regulated Party's response to the Agency after the Agency begins to seek compliance.*<sup>99</sup>

In the view of the Administrative Law Judge, the 15% across-the-board willfulness enhancement applied by MPCA is not reasonable, for several reasons.

First, it appears that the MPCA did not follow the directive in the APO Calculation Guidance to take the response of the Regulated Party into consideration. It is undisputed that PWP responded to the MPCA in a forthright and cooperative manner both during the Agency's inspection and after it brought the violations to PWP's attention. PWP immediately engaged Omni Environmental to provide assistance in arranging for the testing of materials, proper disposal of the waste that was present on the Cannon Falls property, and developing approaches to ensure future compliance. Mr. Hernke, by all accounts, was honest and cooperative during the inspection and its aftermath, and all of the corrective action had been implemented by the time of the hearing. PWP's prompt and cooperative response to the MPCA should reduce the enhancement applied by the Agency.

Second, any enhancement for willfulness should be restricted to the first group of violations. There is evidence of willfulness as to that violation, since several types of waste burned by PWP were identified as prohibited in its burning permit and in state law. PWP knew or should have known of these restrictions. However, there is no convincing evidence of willfulness with respect to the remainder of the groups of violations involved in the APO. As discussed above, Mr. Hernke attempted to learn about the materials used and proper disposal methods by referring to MSDS sheets and talking with paint manufacturer representatives. PWP also took steps to avoid projects involving lead paint. There is no evidence that PWP was aware of the air permitting requirements or the labeling or ID/licensure requirements for used oil materials, or that it chose to act in disregard of such requirements.

Finally, imposition of a 15% enhancement for "willfulness" in this case is not in keeping with MPCA's actions in the other cases it identified in the Case Development Form as being comparable to PWP's case. For example, no enhancement for willfulness was imposed by the MPCA in the Thielen Construction case, despite the fact that the company had dumpsters available and still chose to burn plastic, pop cans, and air filters.<sup>100</sup> Moreover, in the Hammel Equipment case, only a 10% enhancement for willfulness was ordered even though the company admitted it had been burning waste since 1980, there was evidence that a mattress, buckets, metal, cans, chairs, cardboard, aerosol cans, plastic and wood pallets, and other solid waste had recently

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<sup>99</sup> Ex. AA at 4 (emphasis added).

<sup>100</sup> Ex. 5.

been burned, garbage service and dumpsters were available, and the property was located approximately 100 feet from a DNR-designated trout stream.<sup>101</sup> Although 20% enhancements were ordered in the Eagle Transport and Dyrdaahl Lumber cases, Eagle Transport had first been warned by the Fire Department not to burn its garbage, and Dyrdaahl Lumber had received a Letter of Warning from the MPCA two weeks earlier for failing to collect and transport solid waste to a permitted facility. In contrast, PWP never received any prior warning and there is no evidence that it knew all garbage needed to be managed exclusively through its garbage service.

Under these circumstances, the 15% enhancement of the total penalty for willfulness is unreasonable. The Administrative Law Judge recommends that the enhancement be reduced to 10%, and be applied only to the \$3,500 base penalty assessed for the first group of violations.

### **History of Past Violations**

The statutory factors permit consideration of the regulated party's history of past violations and the number of violations involved. In this case, PWP had no past history of violations with the MPCA. The APO calculation worksheet noted this fact, but made no downward adjustment in the penalty. As discussed below, the Administrative Law Judge has concluded that it was unreasonable not to adjust the penalty downward since PWP was a first-time violator, and finds this to be an appropriate consideration under the category of "other factors as justice requires."

### **Economic Benefit**

The statute allows for consideration of the economic benefit gained by the person committing the violation. The MPCA's APO Calculation Guidance states, "In order for a penalty to be an effective deterrent and in order to ensure that a company or person (regulated parties) does not benefit from violating environmental laws, the penalty amount must address the economic benefit the violator realized from the noncompliance. Economic benefit typically results from the delayed costs, avoided costs and/or competitive advantage of the noncompliance."<sup>102</sup>

In this case, by burning items and retaining ash on its Cannon Falls property, and by retaining used sandblast media on that property and remote project sites, it is likely that PWP avoided the costs of disposal that would otherwise have been imposed. In calculating the penalty, the MPCA estimated that disposal costs would have been \$545. It thereafter deducted the amount of \$231.14 (which it contended was the "actual cost to dispose of ash") to arrive at an overall amount of economic benefit of \$313.86.<sup>103</sup>

Based upon the exhibits introduced at the hearing, however, it is clear that PWP incurred actual costs in the amount of \$771.06 to dispose of both the ash and the used

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<sup>101</sup> Ex. 8.

<sup>102</sup> Ex. AA at 5.

<sup>103</sup> Ex. Y at 5.

sandblast media.<sup>104</sup> Because the amount actually paid by PWP to properly dispose of these materials exceeds the amount of avoided costs estimated by MPCA, it is not reasonable to impose any additional charge for economic benefit. The recommended approach is also consistent with the MPCA's penalty calculations in the Eagle Transport, Dyrdaahl Lumber, Hammel Equipment, and Thielen Construction cases.<sup>105</sup>

### **Other Factors as Justice May Require**

The statute allows for adjustment of the penalty for "other factors as justice may require." The APO Calculation Guidance includes the following information about this factor:

Individual cases raise unique facts and issues. Under this section, an adjustment to the base penalty may be made based on those unique facts and issues. Under this section the penalty may be enhanced or mitigated based on the applicable "other factors". If the adjustment of the base penalty is based in whole or in part on "other factors as justice may require," then the factors must be specifically identified in the APO. If the Regulated Party refuses to respond to Agency notices or calls or refuses to take any corrective action, such behavior may warrant an increased penalty. However, prompt response to violations is expected and therefore does not warrant a decrease in penalty.<sup>106</sup>

The MPCA's APO did not make any adjustment to the penalty based upon this factor, and simply noted, "There are no other factors."<sup>107</sup>

In other cases, the MPCA has applied this factor to reduce the penalty that is ordered. For example, in a case involving Birch Creek Properties, LLC,<sup>108</sup> the MPCA reduced a \$5,000 base penalty to \$3,500 because Birch Creek had no previous violations, was unlikely to violate again, and the violations did not result in financial gain to Respondent. The Administrative Law Judge in that case noted that the MPCA had reduced the penalty due to mitigating factors and had shown leniency for a first-time violator, and recommended that the APO be affirmed. Similarly, in a feedlot APO involving intentional discharge of industrial wastes from a farm basin,<sup>109</sup> MPCA staff lowered the penalty amount to approximately one-third of the original base penalty

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<sup>104</sup> The three load tickets attached to Ex. X show that PWP paid SKB Environmental \$231.14, \$259.85, and \$280.07 for the ash and sand.

<sup>105</sup> Exs. 5-8. Despite the fact that garbage service was available to each of these companies, the MPCA did not impose any enhancement for economic benefit in the APOs that were issued. The penalty calculation worksheet for Thielen Construction stated that the reason for imposing no additional penalty was that Thielen "has paid to dispose of the waste." Ex. 5c at 4. A similar rationale should be applied with respect to PWP.

<sup>106</sup> Ex. AA at 5.

<sup>107</sup> Ex. Y at 4.

<sup>108</sup> *In the Matter of the Administrative Penalty Order Issued to Birch Creek Properties, LLC*, OAH Docket No. 2-2200-17483-2 (2006).

<sup>109</sup> *In the Matter of the Administrative Penalty Order Issued to Loren Sniesrud*, OAH Docket No. 6-2200-11685-2 (1998).

because of the cooperation exhibited by the regulated party throughout the MPCA's investigation, his efforts to insure removal of the waste from his farm basin, the size of his operation, his ability to pay, and the precedent established in other cases. Ultimately, MPCA staff lowered the base penalty amount by \$5,250.00, from \$7,500.00 to \$2,250.00. With a \$750 enhancement based on the culpability/willfulness, the end result was \$3,000.00. The Administrative Law Judge affirmed the resulting APO.

Several mitigating factors are present here which, in the interests of justice, must be taken into consideration to avoid imposition of an unreasonable penalty. PWP is a small, individually-owned, home-based painting business. Mr. Hernke is the only full-time employee of PWP, and the only individual who works on the Cannon Falls property. PWP has no history of any prior violations of MPCA statutes or rules. In fact, the November 19, 2008, inspection was the first time that PWP had ever had any contact with the MPCA. As discussed above, PWP avoided projects involving lead paint and attempted to learn about the composition of the materials that were being used and the manufacturers' recommended disposal methods. Apart from the first group of violations, there is no evidence that PWP's violations were willful.

After learning of the violations alleged by the MPCA, PWP promptly retained Omni Environmental to arrange for laboratory testing and provide assistance with corrective actions, and engaged Leisch & Associates as a consultant on the air permit issue. Based upon the testing of the ash pile, the soil beneath the ash pile, and the used sandblast media samples, these materials were determined not to constitute hazardous waste, and ultimately were accepted at a solid waste disposal facility.

Mr. Hernke was very straightforward and cooperative with the MPCA throughout this process. He went to great lengths to ensure that the ash and used sandblast media were removed from his property, he obtained all necessary permits and licenses, and proper procedures were in place for the future evaluation, handling, and disposal of potentially hazardous waste. It is highly unlikely that he will commit repeated violations in the future.

Finally, PWP demonstrated that it has incurred substantial costs in connection with this matter (approximately \$15,000 by the date of the hearing) and has experienced financial hardship due to the effects of the economic downturn and the cease and desist order imposed by Goodhue County. Despite these financial difficulties, PWP implemented nearly all of the corrective action required by the MPCA by the time the APO was issued, and had completed everything by the date of the hearing. The proposed monetary penalty set forth in the APO will have a significant detrimental economic impact on the Company.

Based on all of these mitigating factors--the cooperation exhibited by PWP throughout the MPCA's investigation; its extensive efforts to ensure removal, testing, and proper disposal of the waste from the property; the small size of its operation; its ability to pay in light of the significant costs already incurred in connection with this matter and the financial hardship it has endured due to the cease and desist order; the absence of prior violations; and the unlikelihood of future violations--the Administrative

Law Judge recommends that the total penalty imposed on PWP be reduced by 30%. As a result, the following modifications are recommended to render the penalty reasonable:

# **REVISED PENALTY TABLE**

	<b><i>FORGIVABLE</i></b>		<b><i>NON-FORGIVABLE</i></b>	
<b><i>BASE PENALTY</i></b>	\$550		\$5500	
<b><i>WILLFULNESS/CULPABILITY</i></b>	0%	\$ 0	10% on \$3500 only	\$ 350
<b><i>HISTORY</i></b>	0%	\$ 0	% 0	\$ 0
<b><i>ECONOMIC BENEFIT</i></b>	\$ 0		\$ 0	
<b><i>SUBTOTAL</i></b>	\$550		\$5850	
<b><i>OTHER FACTORS AS JUSTICE MAY REQUIRE</i></b>	30% Reduction (-\$165)		30% Reduction (-\$1755)	
<b><i>TOTAL PENALTY</i></b>	\$385		\$4095	

**B. L. N.**